BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACKIE L. NELSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,485
DELBERT CROWL CO., INC.	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award rendered by Assistant Director Brad E. Avery on November 26, 1997. The Appeals Board heard oral argument June 24, 1998.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent identifies the following issues for review:

(1) Whether claimant met with personal injury by accident on the dates alleged. Claimant seeks benefits for an injury diagnosed as a herniated disc at L4-5. He alleges accidents at work in March 1994 and May 17, 1994. Respondent contends the disc herniation did not occur at work on the dates alleged but occurred, instead, on May 18, 1994, when claimant sneezed at home.

(2) Whether claimant's accidental injuries arose out of and in the course of his employment with respondent. As indicated above, respondent contends the injury occurred at claimant's home, not at work.

(3) Whether claimant gave proper notice was listed as an issue in the Application for Review. At the time of oral argument, claimant agreed and stipulated that he did not give notice of the first incident in March 1994. Respondent, on the other hand, agreed and stipulated that claimant did give adequate notice of the accident on May 17, 1994.

(4) The nature and extent of claimant's disability. Respondent argues the work disability awarded is too high. According to respondent, claimant has not made a good faith effort to obtain employment since his injury and a wage earning ability should be imputed to claimant on the basis of principles stated in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Findings of Fact

(1) Claimant worked for respondent as a heating and air conditioning technician. He installed and worked on heating and air conditioning units. He also did some work for respondent on a farm respondent owned.

(2) Claimant testified to several incidents producing low back symptoms. The first was in March 1994 while claimant was working on respondent's farm. Claimant experienced pain in his back and down his right leg when he was pulling electric fence post stakes. Claimant did not report this incident and did not miss any work but testified his back continued to hurt for some time. He also had a sensation that his leg had gone to sleep and testified he continued to have those sorts of sensations.

(3) Claimant had similar symptoms on May 17, 1994, while loading an old condensing unit into a van. Claimant testified he told his boss that day that his back was sore and that he wanted to go home but he was not permitted to do so. That evening his back was sore but by morning he did not feel bad.

(4) On the morning of May 18, 1994, claimant sneezed at home and again experienced symptoms in his low back. This time the symptoms continued to get worse. Claimant reported to work but told respondent he needed to see a chiropractor.

(5) Claimant went to a chiropractor, Dr. Larry Jansen. After seeing the chiropractor, claimant went to get a house key from his wife so that he could get back into the house. While there, he collapsed in the restroom and an ambulance was called to take him to the hospital. But claimant refused to go to the hospital and went home instead. At home the symptoms

continued and he was then taken by ambulance to St. Joseph Medical Center where he was kept overnight.

(6) The hospital records reflect a ten-year history of back pain with an exacerbation when he coughed in the morning. Claimant denied having given that history but stated he did refer to the sneezing, not coughing, at home that morning. The MRI done at the hospital revealed probable herniated disc at L4-5. Claimant rejected a proposed course of treatment and, instead, was discharged from the hospital against medical advice.

(7) Claimant was treated by Dr. Robert L. Eyster beginning September 14, 1994. Notes from Dr. Eyster's initial visit show a history of injury pulling stakes in March of 1994 with recurrent pain going into the hip and leg since. Dr. Eyster diagnosed herniated disc at L4-5 consistent with the MRI done at the hospital. Dr. Eyster continued to provide conservative treatment through June 7, 1995, when he concluded claimant had reached maximum medical improvement. At that time, he rated claimant's impairment as 7 percent of the whole body. He recommended restrictions against lifting over 60 pounds on a single lift with no repetitive lifting over 30 pounds. He also recommend claimant not engage in repetitive bending or twisting.

(8) Dr. Eyster testified, in response to a hypothetical question stating the history of two incidents at work and the sneezing incident at home, that in his opinion claimant herniated his disc at the time of the sneezing incident at home.

(9) Claimant was treated by Dr. Paul S. Stein, a board-certified neurosurgeon, beginning November 20, 1995. Dr. Stein treated first with epidural injections and physical therapy. When the conservative treatment was not successful, Dr. Stein recommended and performed surgery, a partial diskectomy at L4-5 on the right in March 1996. Dr. Stein rated claimant's impairment as 10 percent of the whole body. Dr. Stein released claimant to work within the limits indicated by the FCE which generally limited claimant to sedentary-light work level.

(10) Dr. Stein testified claimant gave him a history of the March and May incidents at work but not the sneezing incident at home. Dr. Stein opined that the disc at L4-5 was probably first injured in March 1994 and then re-injured at work in May 1994. He stated the sneeze may have been an added factor but the underlying lifting injuries were more likely the significant injury.

(11) Claimant was examined by Dr. Pedro A. Murati at the request of his counsel. Dr. Murati rated the impairment as 22 percent of the body as a whole. Dr. Murati believed claimant could work in the light category of work, slightly better than indicated by the FCE. But he agreed with the opinion of Ms. Karen C. Terrill based on Dr. Stein's restrictions that claimant lost the ability to perform 63 percent of the tasks he performed in the previous 15 years of work.

(12) Claimant gave Dr. Murati the history of an injury pulling stakes and lifting an air compressor. Dr. Murati concluded the lifting of the air compressor was the major incident because, according to the history given Dr. Murati, that incident caused radiating pain. Based on that history, Dr. Murati opined that claimant strained his back when he pulled the stake, herniated the disc when he lifted the compressor, and aggravated the herniation when he sneezed at home.

(13) Dr. Murati testified that claimant has, because of his injuries, lost the ability to perform 63 percent of the tasks he performed in the work he did during the fifteen years before the injury.

(14) Claimant has not worked for respondent since May 17, 1994. In August 1996, after he was released by Dr. Stein, claimant began driving a cab. Claimant worked as a cab driver for almost one year and then quit for what he described as personal reasons.

(15) The Board finds claimant earned $115.38 per week during the period he worked as a cab driver. This conclusion is based on claimant's testimony that he did not earn more than $500 per month driving a cab and on claimant's income records. Those records are less complete than is preferred but appear to show a monthly income slightly less than the $500 per month.

Respondent has argued for a significantly higher wage based on testimony that claimant, in addition to driving a cab, worked in the cab office. For the office work he received $5.50 per hour. For that office work, claimant received a credit against the amount he paid the cab company for use of the cab. The record is unclear about whether the $5.50 may have been credited against the daily rate he paid for the cab or whether he received the credit in addition to the $5.50 per hour. More importantly, claimant's testimony indicates the amount shown on the income record already factored in the $5.50 per hour and any credit he received. Claimant testified, in effect, that the amounts shown as total income were the total of all he earned, including what he earned for the office work, less expenses. While, as indicated, claimant's income records are less complete than desired, they are essentially uncontradicted and the Board cannot say they are so unreasonable or so lacking in credibility that they should be disregarded.

Finally, the Board notes claimant was no longer working as a cab driver at the time he last testified in July of 1997. He had taken a job with a relative and had only worked one-half of the morning before he last testified. The Board generally looks to wage in the last job to calculate the wage loss but has not done so in this case because the testimony about this last job is too uncertain to rely on. Claimant testified he did not know how long the job would last or really how much he would be paid. He recalled being told something about 40 to 50 dollars per day. In the Board's view, this testimony is not certain enough to act as reliable basis for computing a wage in this job.

(16) The wage claimant earned after the injury is 60 percent less than the wage claimant was earning at the time of the injury.

Conclusions of Law

(1) The Appeals Board finds claimant did suffer accidental injury arising out of and in the course of his employment. Claimant's testimony regarding the two incidents at work is essentially uncontradicted and is credible. Under the circumstances of this case, the Board finds the sneezing incident at home to be a natural and probable consequence of the original injury at work and not a superseding separate accident. When a primary injury is shown to be compensable, every consequence of that injury, including a new and distinct injury, is

compensable if it is a direct and natural result of the primary injury. Roberts v. Krupka, 246 Kan. 433, 442, 790 P.2d 422 (1990).

Even if a sneezing incident at home might in some cases be a separate accident, the Board does not consider it to be a separate accident in this case. Here, the evidence shows prior injury involving trauma to the back with radiating pain. The Board accepts the testimony of Dr. Murati that, most likely, the disc herniated at the time of lifting the compressor. The symptoms may have temporarily subsided at the time of the sneezing incident at home but, in the Board's view, the significant injury was at work and the sneezing incident was a direct and natural result of the compensable work injury.

(2) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

(3) A claimant who is not working after the injury may not use a 100 percent wage loss factor unless he or she has first shown that he/she made a good faith effort to find appropriate work. Absent such a showing, the Board must impute to the claimant a reasonable wage based on all relevant factors, including testimony of a vocational expert regarding claimant's ability to earn a wage. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(4) The Board finds claimant has a 60 percent wage loss to be used as the wage factor in the work disability calculation. The respondent argues that claimant was underemployed in his post-injury work as a cab driver and, therefore, the work claimant obtained is not appropriate work. Respondent relies, in part, on testimony from Ms. Karen C. Terrill. Ms. Terrill testified she had reviewed income records from claimant's work as a cab driver. She considered him underemployed because those records indicated he was making less than minimum wage. Based on her experience, she believed cab drivers in Wichita make more than minimum wage and she saw nothing in claimant's restrictions which would prevent him from working as a cab driver.

Respondent's argument asks the Board to determine what is appropriate employment. The Copeland decision does, as respondent notes, refer to a good faith effort to find "appropriate" employment. The Board concludes, however, that the determination regarding what is "appropriate" employment should be a limited one. The Board does not believe the Copeland decision requires that all claimants seek the highest possible wage. Too many other factors reasonably influence a good faith decision about employment. Nor does the Board

believe the Copeland decision intended for the administrative law judges or the Board to determine what employment is in the best interest of the claimant. In our view, a claimant in a workers compensation case, unable to perform his or her previous employment because of the injury, is entitled to seek new employment which is in his or her best interest, the same as any other person might, and without regard to its effect on the calculation of work disability. What the claimant should not be able to do is seek low wage employment for the purpose of enhancing the workers compensation benefits. If he/she were to do so, that would not be "appropriate" employment.

In this case the Board finds claimant did make a good faith effort to obtain "appropriate" employment. The employment did not produce the type of income he might expect and perhaps can obtain. He has now left that work to do other, perhaps higher wage, work. The Board does not, however, believe he was acting in bad faith to enhance his workers compensation claim. The Board finds he was acting in good faith to obtain "appropriate" employment.

(5) Claimant has lost the ability to perform 63 percent of the tasks he performed in the relevant work history. K.S.A. 44-510e.

(6) Claimant has a 61.5 percent general body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery on November 26, 1997, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jackie L. Nelson, and against the respondent, Delbert Crowl Company, Inc., and its insurance carrier, Commercial Union Insurance, and the Kansas Workers Compensation Fund, for an accidental injury which occurred May 17, 1994, and based upon an average weekly wage of $289.13, for 93 weeks of temporary total disability compensation at the rate of $192.76 per week, or $17,926.68, followed by 207.26 weeks at the rate of $192.76 per week, or $39,951.44, for a 61.5% permanent partial general disability, making a total award of $57,878.12.

As of July 31, 1998, there is due and owing claimant 93 weeks of temporary total disability compensation at the rate of $192.76 per week, or $17,926.68, followed by 126.43 weeks of permanent partial compensation at the rate of $192.76 per week in the sum of $24,370.65, for a total of $42,297.33, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $15,580.79 is to be paid for 80.83 weeks at the rate of $192.76 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Kendall R. Cunningham, Wichita KS
Steven L. Foulston, Wichita, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director